

11 August 1955

MEMORANDUM FOR MR. HOUSTON

SUBJECT: Application of Nevada Unemployment Compensation Law

OGC Has Reviewed

1. The application of the Nevada Unemployment Compensation Act (Nevada Compiled Laws, Supplement 1931 - 1941, § 2825), as amended, to the company in the circumstances of our case, appears to hinge on the interpretation of a most complicated series of definitions included in the statute. Under the statute, contributions are required of each employer with respect to wages payable for employment, occurring during each calendar year (Supp. 1943 - 1949, § 2825.07). "Employer" is defined, insofar as pertinent here, as any individual or organization which has "in its employ . . . one or more individuals performing services for it within this state" (Supp. 1931 - 1941, § 2825.02(g)) which for any "calendar quarter has paid or is liable to pay wages of \$225 or more, and which employ during such period one or more persons in an employment subject to this act" (§ 2825.02(h)). "Employment" is defined, in relevant part, (Supp. 1943 - 1949, § 2825.02):

"Employment", subject to the other provisions of this subsection, means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied.

(1) The term 'employment' shall include an individual's entire service, performed within or both within and without this state if -

(a) The service is localized in this state; or

(b) The service is not localized in any state but some of the service is performed in this state and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this state; or (ii) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

(3) Service shall be deemed to be localized within a state if -

(a) The service is performed entirely within such state;
or

(b) The service is performed th within and without such state, but the service performed without such state is incidental to the individual's service within the state, for example, is temporary or transitory in nature or consists of isolated trans- actions."

2. The circumstances of our case would appear to place the situation with respect to the company outside the definition as follows:

(a) The entire service of the individuals involved is not localized within Nevada since it is not performed entirely within Nevada and the service performed outside Nevada is not "incidental to the individual's service within Nevada" (in fact, the reverse is true, i.e., service within Nevada is incidental to the service performed outside Nevada).

(b) The service is localized within a state (California), since that in Nevada is temporary or transitory in nature, and

(i) the base of operations or place from which the service performed in Nevada is directed or controlled is not in Nevada, and

(ii) the individuals' residences are not in Nevada.

Both (a) and (b) above must be true in order to bring our case outside the requirement to make contributions. There would appear to be little doubt that we meet all the requirements, with the possible exceptions that service in Nevada may be considered as other than temporary or transitory and the Nevada authorities may consider that the individuals' residences are in Nevada.

3. A possibly helpful provision is available in § 2825.25h of the Employment Security Administration Law, as amended, as follows (Supp. 1943 - 1949):

"(a) the executive director is hereby authorized to enter into reciprocal arrangements with the appropriate and duly authorized agencies of other states, or the federal government or both, whereby:

(1) Services performed by an individual for a single employing unit for which services are customarily performed by such individual in more than one state, under circumstances not specifically provided for in section 2.9 of the Nevada unemployment compensation law, shall be deemed to be service performed entirely within any one of the states in which any part of such individual's service is performed, or in which such individual has his residence, or in which the employing unit maintains a place of business provided there is in effect, as to such services, an election by an employing unit with the acquiescence of such individual, approved by the agency charged with the administration of such state's unemployment compensation law, pursuant to which services performed by such individual for such employing unit are deemed to be performed entirely within such state."

4. Machinery and procedure for the administration of the Act, including administration determinations of coverage, are provided in the Employment Security Administration Law. The Executive Director of the Employment Security Department is directed to administer the Unemployment Compensation Law and "he shall have power and authority to adopt, amend, or rescind such rules of regulations, . . . make such expenditures, require such reports, make such investigations, and take such other action as he deems necessary, or suitable to that end . . . Not later than the first day of September 1942, and of every second year thereafter, the executive director shall submit to the governor a report concerning the administration and operation of this act during the preceding biennium . . . (Supp. 1941 1949, § 2825.25c; emphasis supplied). In connection with determinations of coverage (§ 2825.25c):

"The executive director may, upon his own motion or upon application of an employing unit, and after notice and opportunity for hearing, make findings of fact and on the basis thereof, determinations with respect to whether an employing unit constitutes an employer and whether services performed for, or in connection with the business of an employing unit constitute employment for such employing unit. Appeal from any such determination may be taken to the appropriate district court within fifteen days after the mailing or delivery of notice of such findings and determination to the employing unit. If supported by substantial evidence and in the absence of fraud, a determination of the executive director, in the absence of an appeal, shall be conclusive as to all matters except as to errors of law, except as hereinafter provided, and, together with the record shall be admissible in any subsequent judicial proceeding involving liability for contributions. A determination of the executive director which has not been appealed, or of a district court on appeal, together with the record may be introduced in any proceeding involving a claim for benefits, and shall be conclusive as to the facts and the determination, unless the claimant shall introduce substantial evidence controverting a material fact so found."

5. Penalties. The Unemployment Compensation Act provides both civil and criminal penalties.

(a) Civil:

(1) Interest, at the rate of one per centum for each month or part of a month in which a contribution remains unpaid, shall be due (Supp. 1931 - 1941, § 2825.14).

(2) (a) Arbitrary Assessments. If an employer shall neglect or refuse to make and file any report of wages and contributions as required by this act or by any regulation of the commissioner, or if any report which has been filed is deemed by the commissioner to be incorrect or insufficient, and if, within seven days after the commissioner has given written notice by mail to the employer to file a sufficient report, the employer fails to file such report, the commissioner may make an estimate based upon any informa-

tion in his possession of the amount of wages paid or payable by the employer for the period or periods in respect to which he failed to report, which said estimate shall be *prima facie* correct, and upon the basis of said estimated amount shall compute and assess the contribution payable by the employer, adding to the amount of contribution so determined a forfeit equal to ten percent (10%) of such contribution.

(3)(b) Additional Forfeits. When it appears to the commissioner that the neglect or refusal of an employer to file a report, as required by this act or by regulation, is willful and deliberate, or fraudulent, or with intent to evade the payment of contributions, there shall be added to the contribution and forfeit provided in the preceding section, a further forfeit equal to twenty-five percent (25%) of the amount of contribution so assessed, which shall become due and payable at the same time as the assessed contribution.

(b) Criminal.

Any employing unit or any officer or agent of any employing unit or any other person who makes a false statement or representation knowing it to be false, or who knowingly fails to disclose a material fact, to prevent or reduce the payment of benefits to any individual entitled thereto, or to avoid becoming or remaining subject thereto, or to avoid or reduce any contribution or other payment required from an employing unit under this act or who willfully fails or refuses to make any such contributions or other payment or furnish any reports required hereunder or to produce or permit the inspection or copying of records as required hereunder, shall be punished by a fine of not less than \$50 nor more than \$500 or by imprisonment in the county jail for not longer than six months, or by both such fine and imprisonment. Whenever two or more persons shall conspire to accomplish any of the objects provided in this subsection, every such person shall be punished by a fine of not less than \$100 nor more than \$1,000, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.

Any person who shall willfully violate any provision of this act or any order, rule, or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of this act, and for which a penalty is neither prescribed herein nor provided by any other applicable statute, shall be punished by a fine of not less than \$50 nor more than \$500, or by imprisonment for not longer than six months, or by both such fine and imprisonment.

Any person who, by reason of the nondisclosure or misrepresentation by him or by another, of a material fact (irrespective of whether such nondisclosure or misrepresentation was known or fraudulent) has received any sum as benefits under this act while

any conditions for the receipt of benefits imposed by this act where not fulfilled in his case, or while he was disqualified from receiving benefits, shall, in the discretion of the commissioner, either be liable to have such sum deducted from any future benefits payable to him under this act or shall be liable to repay to the commissioner for the unemployment compensation fund, a sum equal to the amount so received by him, and such sum shall be collectible in the manner provided in section 14(b) of this act for the collection of past-due contributions. The commissioner may waive the recovery or adjustment of all or part of the amount of any such overpayment which he finds to be uncollectible or the recovery or adjustment of which he finds to be administratively impracticable.

Any employing unit or any officer or agent of any employing unit or any other person who shall fail to submit such reports as are prescribed and required by the commissioner within the time prescribed by the commissioner shall pay a forfeit of \$5 for each such report. Any employing unit or any officer or agent of any employing unit or any other person who shall fail to submit any report of wages payable within ten days following the expiration of the time prescribed by the commissioner for filing such report, shall, in addition to the \$5 forfeit herein specified, pay interest upon any contribution involved in such report of 5% for the balance of that month, and 5% for each month or portion of each month thereafter; provided, that the interest so accrued shall not exceed 25% of the amount of contribution; provided further, that when it shall appear to the satisfaction of the commissioner that the failure to file reports within the time limited was due to an act of God or other circumstance over which the employing unit, its officers or agent, had no control, then the commissioner may in his discretion waive the collection of all or any portion of such forfeit or interest.

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Not proof read, as of August 11.